MBf Finance Bhd v Alluwi bin Salleh & Anor

HIGH COURT (MUAR) — CIVIL APPEAL NO 12–36 OF 2001
JEFFREY TAN J
1 JANUARY 2002

Civil Procedure *— Appeal — Notice — Enlargement of time — Merger of applicant causing internal freezing of business transactions, whether material in justifying enlargement — Whether applicant's reasons for delay were material and reasonable*

The applicant/plaintiff ('the applicant') applied for enlargement of time to lodge a notice of appeal against the whole of the decision of the Batu Pahat Sessions Court, dismissing its claim against the respondents/defendants ('the respondents') which was pronounced on 10 April 2001. The material before the court was the affidavit of Vidyananthan a/l Ramanadhan, an advocate and solicitor, who deposed that the applicant had possession of the notes of proceedings and grounds of the decision on 23 April 2001, but instructed the filling of the appeal only on 11 May 2001, as the proposal merger of the applicant with Arab Malaysian Finance Bhd resulted in all internal actions and instructions to be frozen up until 11 May 2001 and there were merits in the appeal. The second respondent argued, inter alia, in his affidavit that the reason for the delay was not 'material' and would not justify the enlargement of time and that the applicant's solicitors were negligent, that the appeal having merits was 'relevant' only in the case of an application for enlargement of time to file a memorandum of appeal, that the stated reason for the delay was not reasonable and frivolous and that the question to proceed or not with the appeal could be answered after the lodgement of the notice of appeal, memorandum of appeal and appeal record.

Held, enlarging time to 11 May 2001 for lodgment of the notice of appeal:

(1) Order 49 r 2(3) of the Subordinate Courts Rules 1980 provided inter alia, that the notice of appeal shall be filed within 14 days from the date on which the decision was pronounced. The decision of the Batu Pahat Sessions Court was pronounced on 10 April 2001. Therefore, the applicant should have filed its appeal on or before the 24 April 2001, and not on 11 May 2001. However, time for lodgement of an appeal may be enlarged, either by the court appealed from or by this court (see p 502E–F).

(2) The grant of extension of time was discretionary to be exercised by the judge in each particular case, but the factors to be considered were: (a) the length of the delay; (b) the reasons for the delay; (c) the chances of the appeal succeeding; and (d) the degree of prejudice to the would be respondent if the application was granted (see p 503B–C).

(3) It was entirely conceivable that the proposed merger with Arab Malaysian Finance Bhd could have disrupted the operations

of the applicant. The explanation was not unreasonable. Moreover, the delay was short and there was no evidence that the respondents would in any way suffer any prejudice (see p 507E–G). A

(4) On the merits, the trial court had incorrectly held that the Hire-Purchase Act 1967 ('the Act') could not apply to the agreement in question. Although s 1(2) of the Act provided that the Act shall apply in respect only of hire purchase agreements relating to the goods specified in the First Schedule, it did not mean that whenever the subject matter was not specified in the First Schedule, that parties could never contract under the Act. Therefore, to say that the Act did not apply for the reason simpliciter that the excavator was not one of the goods specified in the First Schedule was a complete misdirection altogether (see p 505A, D–E, H). B C

(5) The intitulement, formation and contents of the agreement were all in conformity with all the requirements of Part II of the Act. Given so, it was more than arguable that the agreement was a hire purchase agreement designed for use in respect of goods specified in the First Schedule of the Act, but adopted and agreed by the parties to be used in respect of the purchase of the excavator. Perhaps the agreement was not a hire purchase agreement under the Act, but yet it could still have been a valid hire purchase agreement, as the provisions of s 1(2) only applied to agreements within its ambit but did not prohibit hire purchase agreements outside its ambit. The trial court held, not for any reasons stated, that the agreement was a hire purchase agreement, but later, ignoring its own finding that the agreement was a hire purchase agreement, the trial court held 'this gives credence to the second defendant's contention that P1 is not a genuine sale and purchase agreement but a money lending transaction'. Such arrant contradiction would only contribute to doubts as to the correctness of the ultimate decision (see pp 505H–506C). D E F

(6) The ultimate decision was influenced by a finding on a non-pleaded and non-disputed issue. The registration of the first respondent as owner of the excavator was not a pleaded issue. Yet to the trial court, registration of the excavator was a material issue, so was the non-production of the original registration book (see p 506C–D). G H

(7) It would appear that clear evidence was missed altogether. According to the transcript of the proceedings, SP1, the credit officer of the applicant's Batu Pahat branch, testified 'Setakat ini mereka berhutang RM118,693.27'. Just before that, the same witness testified that when the fifth instalment and onwards were not paid, the applicant demanded for payment. The guarantee was produced. Evidence was definitely adduced by the applicant towards proof of its claim against the second respondent. Yet it I

was said that the applicant had not proved its claim against the second respondent, because 'no evidence was adduced to this head of claim' (see p 506E–F).

(8) Further misdirections could be adumbrated. Amongst them was the finding that there was 'a material contradiction where the document was signed by the second defendant' when it was not a contradiction but a case of two opposing versions. On the face of it, the grounds of decision were highly debatable (see p 506F–G).

[Bahasa Malaysia summary

Pemohon/plaintif ('pemohon') telah memohon untuk pelanjutan masa untuk membuat notis rayuan terhadap seluruh keputusan Mahkamah Sesyen Batu Pahat yang menolak tuntutannya terhadap responden/defendan ('responden-responden') yang telah dikeluarkan pada 10 April 2001. Bahan yang dikemukakan di mahkamah adalah afidavit Vidyananthan a/l Ramanadhan, seorang peguambela dan peguamcara, yang telah mendeposkan bahawa pemohon mempunyai nota-nota prosiding dan alasan kehakiman pada 23 April 2001, tetapi telah mengarahkan rayuan difailkan pada 11 Mei 2001 kerana penggabungan pemohon dengan Arab Malaysian Finance Bhd telah mengakibatkan tindakan dalaman dan arahan dibekukan sehingga 11 Mei 2001 dan terdapat merit-merit di dalam rayuan tersebut. Responden kedua telah mengatakan, antara lain, bahawa alasan pemohon untuk kelewatan tidak 'material' dan tidak dapat menjustifikasikan pelanjutan masa dan peguamcara-peguamcara pemohon cuai, bahawa rayuan yang mempunyai merit hanya 'relevan' di dalam kes pemohonan pelanjutan masa bagi memfailkan memorandum rayuan, alasan kelewatan yang diberi tidak munasabah dan remeh, dan soalan untuk meneruskan rayuan atau tidak boleh dijawab setelah notis rayuan, memorandum rayuan dan rekod rayuan dibuat.

Diputuskan, melanjutkan masa ke 11 Mei 2001 untuk pemefailan notis rayuan:

(1) Aturan 49 k 2(3) Kaedah-Kaedah Mahkamah Rendah 1980 memperuntukkan, antara lain, bahawa notis rayuan mesti difailkan 14 hari dari tarikh keputusan dikeluarkan. Keputusan Mahkamah Sesyen Batu Pahat dikeluarkan pada 10 April 2001. Oleh itu, pemohon sepatutnya telah memfailkan rayuannya pada atau sebelum 24 April 2001, dan bukan pada 11 Mei 2001. Walau bagaimanapun, masa untuk membuat rayuan boleh dilanjutkan sama ada dari mahkamah yang dirayukan atau mahkamah ini (lihat ms 502E–F).

(2) Pelanjutan masa adalah mengikut budibicara hakim di dalam kes tersebut, tetapi faktor-faktor yang mesti diberi pertimbangan adalah: (a) jangka masa kelewatan tersebut; (b) alasan untuk

kelewatan tersebut; (c) kemungkinan rayuan tersebut berjaya; dan (d) tahap prejudis kepada bakal responden jikalau permohonan tersebut dibenarkan (lihat ms 503B–C). A

(3) Ia boleh difikirkan bahawa penggabungan dengan Arab Malaysian Finance Bhd yang dicadangkan boleh menyebabkan gangguan kepada operasi pemohon. Penjelasan tersebut munasabah. Lagipun, kelewatan tersebut adalah pendek dan tiada keterangan untuk menyatakan bahawa responden akan diprejudiskan (lihat ms 507E–G). B

(4) Pada merit kes tersebut, mahkamah perbicaraan telah khilaf dalam memutuskan bahawa Akta Sewa Beli 1967 ('Akta tersebut') tidak dapat digunakan untuk perjanjian tersebut. Walaupun s1(2) Akta tersebut memperuntukkan bahawa Akta tersebut hanya dapat digunakan untuk perjanjian sewa beli yang berhubung dengan barang-barang yang ditetapkan di dalam Jadual Pertama, ia tidak bermakna bahawa jikalau barang tersebut tidak termasuk di dalam Jadual Pertama, parti-parti tidak boleh membuat perjanjian di bawah Akta tersebut. Oleh yang demikian, dengan berkata bahawa mesin pengorek tersebut bukan merupakan di antara barang-barang di dalam Jadual Pertama merupakan suatu salah arahan (lihat ms 505A, D–E, H)). C D

(5) Tajuk, bentuk dan isi perjanjian tersebut adalah mengikut peruntukan di dalam Bahagian II Akta tersebut. Oleh itu, perjanjian tersebut adalah lebih berkemungkinan merupakan satu perjanjian sewa beli yang direka untuk digunakan untuk barang-barang yang diperuntukkan di dalam Jadual Pertama Akta tersebut, tetapi telah digunakan dan dipersetujui oleh parti-parti dalam pembelian mesin pengorek tersebut. Perjanjian tersebut mungkin bukan merupakan perjanjian sewa beli di bawah Akta tersebut, tetapi ia mungkin merupakan perjanjian sewa beli yang sah kerana s 1(2) hanya digunakan untuk perjanjian di dalam lingkungannya dan tidak melarang perjanjian sewa beli di luar lingkungannya. Mahkamah perbicaraan memutuskan bahawa, tanpa memberi alasan, perjanjian tersebut merupakan perjanjian sewa beli, tetapi kemudiannya, dengan tidak menghiraukan keputusannya sendiri bahawa perjanjian tersebut merupakan perjanjian sewa beli, mahkamah perbicaraan memutuskan bahawa 'ini menyokong hujah defendan kedua bahawa P1 bukan perjanjian jual beli yang tulen tetapi merupakan suatu urusan peminjaman wang'. Percanggahan yang ketara tersebut hanya menimbulkan keraguan bahawa keputusan tersebut adalah betul (lihat ms 505H–506C). E F G H

(6) Keputusan muktamad tersebut telah dipengaruhi oleh pendapat mengenai isu yang tidak diplidkan atau dipertikaikan. Pendaftaran responden pertama sebagai pemilik mesin pengorek tersebut bukan merupakan isu yang diplidkan. Walau bagaimanapun, pendaftaran mesin pengorek tersebut merupakan I

isu yang material kepada mahkamah perbicaraan, dan begitu juga dengan buku pendaftaran yang asal yang tidak dikemukakan (lihat ms 506C–D).

(7) Keterangan yang jelas telah tertinggal sama sekali. Menurut transkrip prosiding, SP1, pegawai kredit cawangan Batu Pahat pemohon memberi keterangan bahawa: 'Setakat ini mereka berhutang RM118,693.27'. Sebelum itu, saksi yang sama telah memberi keterangan bahawa apabila ansuran kelima dan seterusnya tidak dibayar, pemohon menuntut bayaran. Gerenti tersebut dikemukakan. Keterangan telah dikemukakan oleh pemohon untuk membuktikan tuntutannya terhadap responden kedua. Walau bagaimanapun, ia telah dikatakan bahawa pemohon belum membuktikan tuntutannya terhadap responden kedua kerana 'tiada keterangan telah diberikan di bawah kepala tuntutan ini' (lihat ms 506E–F).

(8) Salah arah seterusnya boleh dibayangkan. Di antaranya adalah pendapat bahawa 'terdapat percanggahan material di mana dokumen telah ditandatangani oleh defendan kedua' apabila ia bukannya merupakan percanggahan, tetapi adalah dua versi yang bertentangan. Pada dasarnya, alasan-alasan kehakiman boleh dipersoalkan (lihat ms 506F–G).]

Notes

For cases on notices of appeal generally, see 2(1) *Mallal's Digest* (4th Ed, 2001 Reissue) paras 1027–1101.

Cases referred to

Arab Malaysian Credit Bhd v Har Yoke Ling [1998] MLJU 2 (refd)
Batang Kali Estates Sdn Bhd v Romani bte Abdul Aziz & Anor [1993] 2 MLJ 267 (refd)
Brooke David, deceased, Re; M Sayers & Anor v DB David & Ors [1937] MLJ 231 (refd)
Hau Khee Wee & Anor v Chua Kian Tong & Anor [1987] 2 MLJ 146 (refd)
Jumari bin Mohamad v PP [1982] 1 MLJ 282 (refd)
Karuppiah Pillay v KP Mohamed [1950] MLJ 118 (refd)
Kesang Leasing Sdn Bhd v Mohd Yusof bin Ismail & Anor 1990] 1 MLJ 291 (refd)
Lee Guat Eng v Tan Lian Kim [1985] 2 MLJ 196 (refd)
Lee Lan v Lim Yoon Loy & Ors [1991] 3 MLJ 419 (refd)
Ling Siok Seng v Ting Sieh Chung [1998] 4 AMR 3217 (refd)
Malayan Credit Ltd v Mohamed Kassim [1965] 2 MLJ 134 (refd)
Ooi Bee Tat v Tan Ah Chim & Sons Sdn Bhd & Anor and another appeal [1995] 3 MLJ 465 (refd)
Pearson v Chen Chien Wen Edwin [1991] 3 MLJ 208 (refd)
R v Rhodes (1910) 5 Cr App R 35 (refd)

Ratnam v Cumarasamy & Anor [1965] 1 MLJ 228 (refd)
Safety Insurance Co Ltd v Wong Choo Yong [1971] 1 MLJ 167 (refd)
Sara bte Haji Mat Hassan v Mariam bte Said [1949] MLJ 256 (refd)
Siew Nguong Hin & Ors v Mayban Finance Bhd [503] MD 7 (refd)
Soh Keng Hian v American International Assurance Co Ltd [1996] 1 MLJ 191 (refd)
Tan Siew Peng v OCBC Bank (M) Bhd [1998] 2 MLJ 420 (refd)
Yeo Yoo Teik v Jemaah Pengadilan Sewa, Pulau Pinang & Anor [1996] 2 AMR 1399 (refd)
Zulkifli bin Puasa & Ors v PP [1985] 1 MLJ 461 (refd)

Legislation referred to

Courts of Judicature Act 1964 Schedule item 8
Civil Procedure Code (FMS Cap 7) s 531
Hire-Purchase Act 1967 s 1(2)
Subordinate Courts Rules 1980 O 49 rr 2(3), 6(2)

Jaswant Singh (*Jaswant Singh & Associates*) for the applicant.
Mohd Ashri bin Rais (*Ashri Rais & Co*) for the respondents.

Jeffrey Tan J: This is an application by the applicant/plaintiff ('the applicant') for enlargement of time to lodge a notice of appeal against the whole of the decision, of the Batu Pahat Sessions Court, dismissing its claim against the respondents/defendants ('the respondents').

The rules governing the lodgement of civil appeals from the subordinate courts to the High Court provide that the 'notice of appeal shall be filed within 14 days from the date on which the decision was pronounced' (O 49 r 2(3) of the Subordinate Courts Rules 1980 ('the SCR')) and that an appeal shall be brought by filing a notice of appeal as aforesaid 'and by serving a copy of the notice on every party to the proceedings' (O 49 r 6(2) of the SCR). The decision of the Batu Pahat Sessions Court was pronounced on 10 April 2001. Therefore, the applicant should have filed its appeal on or before 24 April 2001, and not, as was the case, on 11 May 2001. However, all is not lost, as time for lodgement of an appeal may be enlarged, either by the court appealed from or by this court (see *Civil and Criminal Appeals in Malaysia* by Tan Kee Heng at p 27, para 1.4.5; see also *Lee Lan v Lim Yoon Loy & Ors* [1991] 3 MLJ 419 at p 422, where the then Supreme Court held that the proper forum to apply for extension of time, even though the High Court has that power under item 8 of the Sch to the Courts of Judicature Act 1964 to enlarge time, is the court appealed from).

But 'an extension of time to file a petition of appeal or to amend such petition out of time has never been granted as a matter of course' (*Jumari bin Mohamad v PP* [1982] 1 MLJ 282 at p 284, per Mohamed Azmi J, as he then was). Formerly, under s 531 of the Federated Malay States Civil Procedure Code (Cap 7), 'a judge of the Supreme Court may, if he considers that special circumstances render an extension just, give leave to

appeal within such extended time ... as he may think fit'. Without special circumstances, leave was refused (see *Sara bte Haji Mat Hassan v Mariam bte Said* [1949] MLJ 256, and *Karuppiah Pillay v KP Mohamed* [1950] MLJ 118). And it was spelt out even way back then, in *Re Brooke David, deceased; M Sayers & Anor v DB David & Ors* [1937] MLJ 231, per Terrell Ag CJ, that 'in order to get leave, the applicant must show merits and must also explain the reasons for the delay'.

Presently, 'the grant of extension of time is [still] discretionary to be exercised by the judge in each particular case' (see *Lee Lan v Lim Yoon Loy & Ors* at p 422, per Harun Hashim SCJ; see also *Lee Guat Eng v Tan Lian Kim* [1985] 2 MLJ 196 at p 197). But the factors to be considered (it being the general framework for exercising that discretion) are: (a) the length of the delay; (b) the reasons for the delay; (c) the chances of the appeal succeeding; (d) the degree of prejudice to the would-be respondent if the application is granted (those factors were so first outlined by Chan Sek Keong J (as he then was) in *Hau Khee Wee & Anor v Chua Kian Tong & Anor* [1987] 2 MLJ 146 and followed by the Singapore Court of Appeal in *Pearson v Chen Chien Wen Edwin* [1991] 3 MLJ 208, which in turn was followed by the Court of Appeal in *Ling Siok Seng v Ting Sieh Chung* [1998] 4 AMR 3217).

Broadly speaking, 'when an application is made to the court for extension of time, the application should be on grounds sufficient to persuade the court to show sympathy' (*Pearson v Chen Chien Wen Edwin* at p 212, per Yong Pung How CJ; followed by *Vettath v Vettath* [1992] 1 SLR 1). 'There must be some relevant evidential material made available before the court may exercise discretion' (*Soh Keng Hian v American International Assurance Co Ltd* [1996] 1 MLJ 191, per Gopal Sri Ram JCA). ' ... in order to justify a court in extending the time during which some step in procedure requires to be taken, there must be some material upon which the court can exercise its discretion ... otherwise, a party in breach would have an unqualified right to an extension of time which would defeat the purpose of the rules which is to provide a time table for the conduct of litigation' (*Ratnam v Cumarasamy & Anor* [1965] 1 MLJ 228 at p 229, per Lord Guest). 'And ... the burden is upon an applicant who seeks an extension of time to make available that material (*Tan Siew Peng v OCBC Bank (M) Bhd* [1998] 2 MLJ 420, at p 421, per Gopal Sri Ram JCA). If nothing is said about the merits of the appeal, then 'the application must be dismissed' (*Safety Insurance Co Ltd v Wong Choo Yong* [1971] 1 MLJ 167 at p 168, per Gill FJ, as he then was; see also *Ooi Bee Tat v Tan Ah Chim & Sons Sdn Bhd & Anor and another appeal* [1995] 3 MLJ 465). Failure to allude to some facts or law in his affidavit so as to show at least an arguable case and failure to explain the delay may leave the court with no choice but to dismiss the application with costs (*Yeo Yoo Teik v Jemaah Pengadilan Sewa, Pulau Pinang & Anor* [1996] 2 AMR 1399 at p 1402).

The material in the present case before the court is the affidavit, of Vidyananthan a/l Ramanadhan, an advocate and solicitor, who deposed that the applicant had possession of the notes of proceedings and grounds of decision on 23 April 2001, but instructed the filing of an appeal only on

11 May 2001, as the proposed merger of the applicant with Arab Malaysian Finance Bhd resulted in all internal actions and instructions to be frozen up until 11 May 2001, and that there are merits in the appeal. A

The second respondent however argued in his affidavit (encl 9), that the stated reason for the delay is not 'material' and in any event would not justify the enlargement of time, and that the solicitors for the applicant were negligent. The second respondent further argued, that the appeal having merits but without 'keadaan lain yang munasabah bagi alasan melanjutkan masa merayu' is not 'material', that the appeal having merits is 'relevant' only in the case of an application for enlargement of time to file a memorandum of appeal and not to file a notice of appeal, that the stated reason for the delay is not reasonable as the officer of the applicant concerned was stationed in Batu Pahat throughout the appeal period, and that the question to proceed or not with the appeal could be answered after the lodgment of the notice of appeal, memorandum of appeal and appeal record. The second respondent further contended that the stated reason for the delay is frivolous and that the applicant had not identified the person who instructed the filing of the appeal. B C D

Vidyananthan a/l Ramanadhan responded in his second affidavit (encl 12), that the enlargement of time would not prejudice the respondents, that there was no negligence on the part of his firm of solicitors, that delay was not caused by any negligence, and that the applicant, because it wanted first to study the notes of proceedings and grounds of decision, had not in the meantime given any instructions to its Batu Pahat branch. Vidyananthan a/l Ramanadhan further deposed that his firm of solicitors, on the instructions of the applicant, had applied, on 16 April 2001, for the notes of proceedings and grounds of decision, that those notes of proceedings and grounds of decision were forwarded to the applicant on 23 April 2001, that the decision to appeal was to be made after a study of the notes of proceedings and grounds of decision so as to avoid further legal costs, and that the proposed merger of the applicant with Arab Malaysian Finance Bhd was a factor that delayed the decision to lodge the appeal. Vidyananthan a/l Ramanadhan further deposed that given that the claim was for a large sum, he believed that the respondents were aware that the applicant would lodge an appeal. E F G

Oral submissions, which were short, merely repeated some of the material in the affidavits and documentary exhibits. Mr Jaswant Singh for the applicant tendered the authorities of *Soh Keng Hian v American International Assurance Co Ltd* and *Hau Khee Wee & Anor v Chua Kian Ting & Anor* and submitted that the notice of appeal was filed 18 days out of time, that the Batu Pahat branch of the applicant had to refer the matter to its head office who replied late, and that the memorandum of appeal was filed within time, whilst Mr Mohd Ashri for the respondents submitted that the solicitors for the applicant only applied for instructions to lodge an appeal, just the day before the period for appeal lapsed. H I

Nothing was said by the applicant about the merits of the appeal, but yet it is glaring enough that the trial court had seriously misdirected itself as

to the law and had misconstrued the evidence. To begin with, the trial court incorrectly held that the Hire-Purchase Act 1967 ('the Act') could not apply to the agreement in question (that agreement was marked as P1 A-F, see p 8 of the appeal record). The opening paragraph of the grounds of decision, which sets out the pertinent background facts and disputed issue and also the view of the trial court with regard to the applicable law, reads as follows:

> The second defendant is sued as a guarantor in respect of a hire purchase agreement entered between the plaintiff and the first defendant. The subject matter is a Hitachi EX200 excavator. The vehicle does not come within the list of goods in the First Sch of the Hire-Purchase Act 1967 (s 1(2) of the Act), and as such the Act is not applicable to the transaction. It was contended by the defence that s 4(1)(a) and (b) of the Act is applicable to this suit. The words '... in respect of goods ...' in s 4(1) must be read together with s 1(2) of the Act and mean that the goods specified in the First Sch. As the goods in question does not come within the First Sch, the Act does not apply and s 4(1)(a) and (b) is not applicable.

From the standpoint of the trial court, the Act could not apply for the reason that the goods in question — an excavator — was not specified in the First Sch of the Act.

Undoubtedly, s 1(2) provides that 'this Act shall apply throughout Malaysia and in respect only of hire purchase agreements relating to the goods specified in the First Schedule'. But it does not mean, whenever the subject matter is not specified in the First Sch, that parties can never contract under the Act. In *Kesang Leasing Sdn Bhd v Mohd Yusof bin Ismail & Anor* [1990] 1 MLJ 291 (an appeal against the dismissal of the plaintiff's claim on the ground that the subject matter — a computer — did not fall under the First Schedule of the Act). Eusoff Chin J (as he then was) said at p 292:

> The object and purpose of the Act is to regulate the form and contents of hire purchase agreements and the right and duties of parties to such agreements. By sub-s 1(2) of the Act, the provisions of the Act 'shall apply in respect only of hire-purchase agreements relating to the goods specified in the first schedule'. This certainly floes not exclude the application of the provisions of the Act to hire purchase agreements in respect of goods not specified in the first schedule if the parties to the agreement have agreed to be bound by the provisions of the Act. In other words, in respect of goods not specified in the first schedule to the Act, the parties are free to contract outside the provisions of the Act, or agree be bound by those provisions.

And in *Siew Nguong Hin & Ors v Mayban Finance Bhd* reported in [503] MD 7, Abdul Hamid J (as he then was) also held that the Act would apply if the parties intended so. Therefore to say that the Act did not apply for the reason simpliciter that the excavator was not one of the goods specified in the First Sch was a complete misdirection altogether.

What was the intention of the parties? The intitulement of the agreement in the present case reads 'A hire purchase agreement made ...'. And more importantly, the formation and contents of the agreement are all in comformity with all the requirements of Part II of the Act. Given so, it is

more than arguable, that the agreement was a hire purchase agreement designed for use in respect of goods specified in the First Sch of the Act, but adopted and agreed by the parties to be used in respect of the purchase of the excavator. Perhaps the agreement was not a hire purchase agreement under the Act. But yet it could still have been a valid hire purchase agreement, as 'the provisions of s 1(2) only applied to agreements within its ambit but did not prohibit hire purchase agreements outside its ambit' (see *Arab Malaysian Credit Bhd v Har Yoke Ling* [1998] MLJU 2, per Abdul Kadir Sulaiman J, as he then was). Anyway, the trial court held, not for any reasons stated, that 'this [the agreement] is a hire purchase agreement' (see p 3 of the grounds of decision). But later, ignoring its own finding that the agreement was a hire purchase agreement, the trial court held 'this gives credence to the second defendant's contention that P1 is not a genuine sale and purchase agreement but a money lending transaction' (see p 4 of the grounds of decision). With respect, such arrant contradiction would only contribute to doubts as to the correctness of the ultimate decision.

And with respect, the ultimate decision was influenced by a finding on a non-pleaded and non-disputed issue. The registration of the first respondent as owner of the excavator was not a pleaded issue. Yet to the trial court, registration of the excavator was a material issue, and the non-production of the original registration book was a factor held against the applicant.

Also it would appear that clear evidence was missed altogether. According to the transcript of the proceedings, Norhisham bin Annuar ('SP1'), the credit officer of the applicant's Batu Pahat branch, testified 'Setakat ini mereka berhutang RM118,693.27'. Just before that, the same said witness testified that the fifth instalment and onwards were not paid, that the applicant demanded for payment (notices marked P3 and P4). The guarantee ('P2') was produced. Evidence was definitely adduced by the applicant towards proof of its claim against the second respondent. Yet it was said that the applicant had not proved its claim against the second respondent, because 'no evidence was adduced to this head of claim' (see p 5 of the grounds of decision). Further misdirections could be adumbrated. Amongst them was the finding that there was 'a material contradiction where the document was signed by the second defendant' when it was not a contradiction but a case of two opposing versions.

Suffice it to say, on the face of it, that the grounds of decision are highly debatable. There are merits in the appeal. There is an even chance of the appeal succeeding. The appeal would not be hopeless. That is not to say though that it would not ultimately play out in a finding that the ultimate decision of the trial court was justified. That remains to be seen. Also, it would be interesting to see how the contention that the transaction was a money lending transaction would play out in the light of the following ratio of Hepworth J in *Malayan Credit Ltd v Mohamed Kassim* [1965] 2 MLJ 134 at p 135:

> In the case of *Transport and General Credit Corporation Limited v Morgan* [1939] 1 Ch 531 it was agreed between company A and company B that,

whenever a customer proposed to obtain any goods from company A on the hire purchase system, company A would immediately sell the goods to company B and company B would let them to the customer with an option of purchase on payment by instalments. In his judgment, Simonds J commenting on this arrangement said:

> 'It has often been said that it is in any case a question of fact whether a transaction is one of moneylending. It appears to me that it would be contrary to the ordinary use of language to describe this as a moneylending transaction, or to regard the financier (if I may so call him) who undertakes this business as carrying on the business of moneylending.
>
> It must be remembered that hire purchase agreements now take a very large part in the commercial and social life of the community, and the financing of them is an enormous business in the City of London and elsewhere. It appears to me that the financiers and the dealers co-operate in the common venture of making the whole business of hire purchase agreement, which is now, for good or for evil, a necessary part of our social life, feasible, and to regard one party to that common venture, which is now a recognized mercantile service, as carrying on the business of a moneylender is an abuse of language.'

For the same reasons the transaction in the present case is not in my opinion a moneylending transaction.

Lastly, with regard to the explanation that the proposed merger of the applicant with Arab Malaysian Finance Bhd delayed the lodgment of the notice of appeal, it is entirely conceivable that the proposed merger could have disrupted the operations of the applicant. The explanation is not unreasonable. Moreover, the delay was short (in *Zulkifli bin Puasa & Ors v PP* [1985] 1 MLJ 461, at p 462, the Court of Appeal of Brunei held, 'where as here, the delay of a short duration, the court may, if it thinks fit, disregard the delay, even in the absence of satisfactory reasons, but where a substantial interval of time (a month or more) has lapsed, an extension of time will not be granted as a matter of course: see *R v Rhodes* (1910) 5 Cr App R 35. Where the delay is minimal, the court will still not grant an extension of time of the application for which the extension is sought is bound to fail; there must be an arguable case.'), and there is no evidence that the respondents would in any way suffer any prejudice (see *Batang Kali Estates Sdn Bhd v Romani bte Abdul Aziz & Anor* [1993] 2 MLJ 267).

Accordingly, for the above reasons, time is hereby enlarged to 11 May 2001, for lodgment of the notice of appeal.

Time enlarged to 11 May 2001 for lodgment of the notice of appeal.

Reported by Chew Phye Aun